No. 12,775

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LLOYD A. FRY ROOFING COMPANY; VOLNEY FELT MILLS, INC.; ST. JOHNS MOTOR EXPRESS COMPANY; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; and MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR LLOYD A. FRY ROOFING COMPANY AND VOLNEY FELT MILLS, INC.

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JURISDICTION

The statement of Petitioner, National Labor Relations Board, as to jurisdiction is correct, and this court has jurisdiction under Section 10 (e) of the National Labor Relations Act, as amended.

SUPPLEMENTAL STATEMENT OF THE CASE

With the exception of Petitioner's assertion that none of the employer Respondents was a party to the closed shop contract hereinafter mentioned (Petitioner's brief, 5), we do not take exception to the matters set forth in Petitioner's statement of the case. We deem it inadequate, however, for the purpose of presenting a full understanding of these Respondents' position, and we therefore consider it desirable to set forth a further statement of the facts and the questions here involved.

Respondent Lloyd A. Fry Roofing Company (hereinafter referred to as Fry) is a manufacturer of asphalt roofing and prior to and at the time here involved it maintained and operated a plant in the City of Portland, Oregon, in which said product was produced. In the manufacture of this type of roofing, a "felt" or coarse paper base is required. Respondent Volney Felt Mills, Inc. (hereinafter referred to as Volney) engages in the manufacture of the felt base used by Fry in the production of roofing materials. These companies are affiliated corporations and controlled by Lloyd A. Fry, Sr. the majority stockholder in each of them (R. 38, 39, 102). During the early part of 1947, Volney undertook the construction of a plant adjacent to the Fry operation in Portland, Oregon. This plant was completed and went into production in February, 1948 (R. 103). Until that time all of Fry's felt requirements were acquired from sources outside the State of Oregon (R. 103, 104). Thereafter, all of Fry's felt requirements were produced in Oregon in the new Volney plant adjacent to its own.

The operation with which we are here concerned was limited to the erection of the new Volney building and the installation therein of paper-making machinery for the production of felt to be used in the Fry plant. The contract for the construction of the building was let to Campbell - Lowrie - Lautermilch Corporation, Chicago contractors. Prior to the commencement of construction, R. R. Lautermilch, President of this concern, made a trip to Portland, Oregon, in February, 1947, at which time he undertook arrangements for getting the project under way (R. 121). At that time he negotiated with Respondent Building and Construction Trades Council regarding the employment of labor and while still in Portland and on February 21, 1947, executed upon behalf of his company a contract which provided for the employment of A. F. of L. labor on the Volney project (R. 123). This contract was silent as to the installation of the felt mill machinery, but at the time of its execution Mr. Lautermilch was advised by the Building Trades Council that the agreement would not meet with its approval unless assurances were obtained from Fry that the installation of the machinery would be done under A. F. of L. jurisdiction (R. 122). Upon Mr. Lautermilch's return to Chicago, he wrote the Portland Building Trades Council on March 7, 1947 (general counsel's exhibit No. 2, R. 161, 162), to the effect that as yet he was not sure regarding the installation of the machinery but that he was confident that members of the Building Trades Council were familiar with this work and that it would be done on a fair basis to the Council whether or not it was done under the supervi-

sion of his firm. He indicated that this assurance came from the "owner". His testimony was to the effect that where he used the word "owner", he had in mind Lloyd A. Fry, Sr., the majority stockholder of Fry and Volney (R. 39).

Thereafter, the construction of the Volney plant got under way. During the early stages of the project and several months prior to the time it was required, the felt mill machinery was shipped to Oregon and came to rest in storage on the premises of the Fry Roofing Company (R. 62, 63). In August, 1947, about five months following the date of Mr. Lautermilch's letter in which he spoke on behalf of the "owner", J. R. Baker, Chief Engineer of Volney Felt Mills, arrived in Portland for the purpose of supervising the installation of the machinery. He conferred with B. B. Alexander, Portland manager of Fry, advising him that he had been instructed to direct the employment of A. F. of L. labor in the setting of the machinery. A contract for the installation of the machinery was then let to Respondent St. Johns Motor Express Company, at which time V. J. Eggleston, manager of said concern, was told by Baker that pursuant to instructions given him by the "owner", members of Machinists Union No. 63 of the American Federation of Labor were to be employed on the job (R. 45). At that time, confusion existed at least in the minds of employers as to whether or not Local 63 was affiliated with the A. F. of L. (R. 74, 111). This local maintained its headquarters in the A. F. of L. Building in Portland and the business card of its agent, R. W. Johns, which was presented by him at the Fry plant

(Respondents F and V exhibit No. 1, R. 71), bore an A. F. of L. inscription.

Acting under the above mentioned instructions regarding the employment of A. F. of L. labor, James A. Taylor, foreman for Respondent St. Johns, communicated with the Labor Temple by telephone, asking that machinists be dispatched to the plant to work on the installation of the machinery (R. 113). Thereafter, Respondent St. Johns was contacted by Fred H. Manash, Secretary of the Building Trades Council, who advised him that the Council had a contract covering the installation of the machinery. Manash threatened economic sanctions and work stoppage unless the machinists then employed were discharged (R. 83 and 84). Subsequently, and on or about September 2, 1947, these employees were terminated and the following day they were replaced by A. F. of L. workmen (R. 116).

ARGUMENT

I.

The Petitioner did not have jurisdiction for the reason that the operation involved did not affect commerce.

1. It was a local construction project not yet completed.

Petitioner has recited the extent of Respondents' interstate business. This is conceded as they were engaged in interstate commerce in so far as their manufacturing operations were concerned. We are here con-

cerned, however, with the construction of the Volney Building and the installation therein of machinery for the manufacture of felt. As pointed out in our statement of the case, this machinery had been shipped into Oregon some time previously, and that any necessary additions and repairs thereto were procured locally (R. 61). The record is silent as to the source of materials which went into the building, but it was of conventional construction upon which Building and Construction Trades Council workmen were then employed in the course of its erection (R. 124, 125). We submit, therefore, that although these Respondents were in commerce in some particulars, their operations with which we are here concerned in no wise affected commerce.

The record in this case does not disclose evidence which supports a finding that a labor disturbance existed or was threatened during the construction of Volney's plant which would have any effect of consequence on interstate commerce. In the case of NLRB vs. Shawnee Milling Co., 184 F. 2d 57-59, the court held:

> " . . . the Board's jurisdiction does not obtain merely because of local activity may in some indirect and remote way affect commerce."

In the Shawnee Milling Co. case, the court cited and adopted the following ruling announced in NLRB vs. Jones and Laughlin Steel Corp., 301 U.S. 1-31, 57 Sup. Ct. 621:

> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do

not impose collective bargaining upon all industry regardless of effects upon interstate commerce or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

2. *Had the alleged unfair labor practices resulted in work stoppage, interstate commerce would have continued in greater volume than would have been the case if the project had been completed.*

It is our further contention that in the instant case the purpose of the act would not have been effectuated by the exercise of jurisdiction for the reason that a stoppage of work (which did not occur) could have had only the result of continuing rather than interrupting the flow of felt in interstate commerce. Until the completion of the Volney plant, Fry obtained all of its felt requirements from points outside the State of Oregon. The plant was constructed for the purpose of enabling Fry to obtain all of its felt requirements within the State of Oregon. It is therefore apparent that if the felt mill had never been completed, commerce would have been less affected than if the construction proceeded to a conclusion. Petitioner cites its finding to the effect that this construction amounted to an "enlargement" of the Fry plant (Petitioner's Brief 9). There is nothing in the record to support this conclusion. Nothing occurred other than the completion of a facility which permitted Fry to obtain one of its raw materials locally. The Board's position, when analyzed, is a contention

to the effect that a project, the ultimate result of which would be to somewhat alter the direction of the flow of commerce in *diminished volume* would amount to burdening or obstructing the free flow of commerce as contemplated by Congress.

II.

The discharges complained of were made pursuant to a valid closed shop contract.

1. Lautermilch acted as the agent of Respondent Fry in affecting modification of the contract.

It is conceded that Lautermilch and the council entered into a closed shop contract on February 21st (Petitioner's brief page 14) which was prior to the effective date of the Taft-Hartley Act. We assume Petitioner also concedes the validity of a closed shop contract entered into on the date here involved. In any event, such is the law.

See Colgate-Palmolive-Peet Company vs. NLRB, et al., 17 Labor Cases, Par. 65-445; 338 U.S. 335.

Our conflict with Petitioner is upon the question of whether or not Lautermilch as agent for Fry effected a modification of this contract whereby Fry and Volney became parties thereto. We shall discuss first, however, our contention that Lautermilch was acting as Fry's agent in this particular. As we have pointed out (supra, page 3) at the time of the execution of the contract, the Building Trades Council indicated that it did not

meet with its approval unless assurances were had from Fry that it also would cover the installation of the machinery. As already shown, the record is clear that Lautermilch conferred with Lloyd A. Fry, Sr. regarding this matter, and based upon assurances received from him at that time, he wrote the Council (supra, page 3) which letter for the sake of convenience and emphasis we quote in full:

"March 7, 1947

Portland Building Trades Council
Portland, Oregon

Attention: Mr. Fred Manash, Secretary

Gentlemen: Re: Lloyd A. Fry Roofing Company
Felt Plant, Portland, Oregon

During the early part of January when the the writer was in Portland, we discussed the construction of the above building. At that time I agreed that all work on the new building, be it construction, pipe work, *or setting of machinery,* would be done by union men under the jurisdiction of the Building Trades Council. This letter will confirm that agreement, and you may rest assured that we will keep the job on a union basis throughout.

It is not entirely clear in my mind what trades handle the various parts of the machinery setting, but I am sure that there are mechanics familiar with this machinery setting who are *members of the Building Trades Council.*

At the moment I cannot state definitely that all the machinery setting will come under our contract, *but I have been assured by the Owner* that

the work will be done on a fair basis to you whether it is done under our supervision or not.

Very truly yours,

CAMPBELL-LOWRIE-LAUTERMILCH CORP.

/s/ R. R. Lautermilch
R. R. Lautermilch "

RRL:la

(Emphasis Supplied)

Petitioner undertakes to dispose of this evidence by arguing that this letter "is not couched in such terms as would be binding on Fry and Volney" (Petitioner's brief, page 14). The subject deserves further attention, however. Certainly it cannot be argued that as between Lautermilch and the council this letter did not amount to a modification of their contract, and had Lautermilch rather than Fry and Volney gone ahead and installed the machinery, the work involved most certainly would have been held to fall within the contract. Therefore, it is necessary to go but one step further in order to establish the position that Fry and Volney as new parties to the contract likewise were bound. As to Lautermilch's authority to speak for the "owner", it is axiomatic that agency may be conferred orally. In 2 C.J.S. 1055 it is stated:

> "As a contract of agency is not one which is required by statute of frauds to be in writing . . . the authority may be conferred orally. . . . It is the general rule that the authority of the agent must be of equal dignity to the power to be executed by him, but an agent need not have written authority to make a simple written contract."

The fact that this agency existed became apparent beyond doubt upon its ratification by Fry and Volney. We have already shown (supra, page 4) that J. R. Baker, Chief Engineer for Volney, came to Portland with instructions to employ A. F. of L. labor in the setting of the machinery. He passed these instructions on to B. B. Alexander, Fry's Portland Manager, and V. J. Eggleston, Manager of St. Johns, the concern to whom the contract for machinery installation was given. We quote from 2 Am. Jur. 180 as follows:

> "Ratification may be express, as by spoken or written words, or it may be implied from any act, words, or course of conduct on the part of the principal which reasonably tend to show an intention on his part to ratify the unauthorized acts or transactions of the alleged agent. As stated by the American Law Institute, except where certain formalities are necessary, ratification may be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction, or by conduct justifiable only if there is a ratification."

Also in 2 C.J.S. 1089 it is stated:

> " . . . Therefore, unless a particular form of authorization would have been necessary no particular formality is essential to constitute a ratification. Moreover, an agent's acts may be ratified either expressly or impliedly or in writing or by parol. Hence, if written authority was not necessary to justify an agent's execution of a particular type of written instrument it may be ratified by parol. . . ."

2. *The closed shop contract was modified to the extent of including Respondents as parties thereto.*

The fact that Fry and Volney ratified the contract as modified by Lautermilch's letter, and fully performed thereunder, should of itself be sufficient to resolve this phase of the case in favor of these Respondents. If it were argued, however, that the contract and the letter modifying it were not clear, we are entitled to look to the intent of the parties (17 C.J.S. 802) and their performance speaks clearly as to that. The fact that a party to a contract has not signed it, does not render it void (12 Am. Jur. 514; 1006).

We quote further from 17 C.J.S. 857-58 as follows:

> "Parties to an unperformed contract may by mutual consent modify it by altering, exercising or adding provision. . . . A third person may be substituted in the place of a party to a contract with the consent of both the original parties."

Coming closer to the situation at hand, we find that this court held in NLRB vs. Scientific Nutrition Corp., et al., 9th C., 180 F. 2d 447-49, that a contract between an employer and a union need not be in any particular form, and in fact need not even be reduced to writing. In treating with this point, the court commented as follows:

> "It is of significance to note further that upon the advent of the teamsters, that union did not seek . . . any formal agreement establishing a closed shop. Inferably, neither party conceived that course to be necessary. There is, in short, no adequate reason for questioning the good faith of the man-

> agement in acting on its understanding that a closed or union shop was in effect. The essential finding of the Board that there was no agreement for such a shop and that the contract was not understood and administered by the parties as requiring membership in the union is not on consideration of the whole record supported by substantial evidence."

In view of the situation as outlined above we submit that these parties should have been left undisturbed in the performance of their contract. On this point in NLRB vs. Corsicana Cotton Mills, 179 Fed. (2d) 234-35, the Court spoke as follows:

> "The law does not authorize the National Labor Relations Board of the courts to make collective bargaining contracts or to prescribe what shall be written into them. Neither the courts nor the Board may interfere in negotiations as long as they are carried out in good faith. National Labor Relations Board vs. Whittier Mills Company, 5 Cir., 123 F. (2d) 725."

It should be noted also that the National Labor Relations Board found that an oral closed shop agreement was valid. (See In re United Fruit Company, et al., 12 NLRB 404-08.)

Now a word regarding the status of Respondent St. Johns. It was employed by Fry on a cost-plus basis to install the machinery (R. 100). This was done pursuant to a "work order" (R. 78, 79) and with the understanding that St. Johns was to do the work under the complete direction and control of Fry (R. 98, 112). It is apparent, therefore, that St. Johns was acting as the agent of Fry and was likewise bound by the contract,

and no better evidence concerning its provisions may be had than the intention of the parties as shown by their performance.

3. The Respondent Unions represented an uncoerced majority of the employees at the time of the execution of the contract.

At this point we wish to dispose of the contention that the contract, in any event, was not enforcible for the reason that the Respondent unions did not represent an uncoerced majority of employees at the time of its execution. It should be sufficient to point out that the effective date of the Taft-Hartley Act was August, 1947, and that it was provided thereby that any contract valid prior to that date would be valid for at least a period of one year. Prior to the passage of the Act, the Board had taken the position consistantly that in cases involving the building construction trades the "unit" was the entire area involved. Moreover, prior to the passage of the Act, the Board had steadily refused to take jurisdiction of the building trades. (See Johns-Manville Corp., 61 NLRB 1.) We submit, therefore, that it was immaterial that Volney was not employing the workmen involved as of March 7, 1947, the date on which it was made a party to this closed shop contract.

III.

The enforcement of Petitioner's Order would not reasonably effectuate the policies of the Act.

1. The discharge of the workmen involved was the result of economic pressure and coercion carried on to the extent that the acts complained of were not the free will of Respondents.

In discussing this phase of the case, we do not wish to unduly depart from or detract from the emphasis which we are attempting to give to the proposition that these Respondents had executed a valid closed shop contract under which they were bound to perform and pursuant to which they had no alternative but to replace the machinists from Local 63 with workmen affiliated with A. F. of L. In substantiating our contention as to the contract and also in support of the comments to follow regarding coercion, we quote from the testimony of B. B. Alexander:

> "Yes. When it was determined—when we found that we had perhaps the wrong union membership on the job from what we thought we had, and in view of the fact that that matter had become serious in tying up all of the work and we had made an honest mistake in employing probable the wrong people, the best thing to do was to get the people that we had intended to have." (R. 105)
>
> * * * * *
>
> "Q. Was that the thing that decided you then to direct that the machinists be taken off the job and the millwrights put on?
>
> A. The thing that decided me was the fact that we found that we had in our employ a different

union from what we had expected to have, or that we had—

Q. Well, Mr. Baker, you say, had instruction to employ machinists from Lodge 63, didn't he?

A. A. F. of L.; that was specifically mentioned.

Q. You think it turned on the A. F. of L. and not the machinists Lodge 63?

A. It was A. F. of L. Lodge 63 was the information Mr. Baker—

Q. Well, you got machinists from Lodge 63, didn't you?

A. Yes.

Q. And it was formerly an affiliate of A. F. of L.; isn't that correct?

A. I understand, but not then. That was the cause of the trouble." (R. 111)

If we were to concede that the Board had jurisdiction and that these Respondents did not, as we claim, have a valid closed shop contract with the Council, we submit that in any event Respondents who were acting with the utmost good faith were protected and justified in doing the acts complained of because of the coercion practiced upon them by the Council which was of such severe nature as to constitute duress and which rendered the acts committed by them to be not of their own free will and volition. The adamant stand taken by the Council in respect to replacement of machinists which were coupled with threats of economic sanction is implicit from the testimony of several witnesses.

R. W. Johns, the machinists' business agent, testified as follows:

"Q. What conversation took place? What did Mr. Manash say?

A. There was quite a general discussion and Mr.

Manash had told Mr. Eggleston, or was telling him that if failing to comply with—or to appear before his Executive Board and show cause why he shouldn't be placed on the unfair list, that that action would be taken, the Building Trades' men would be removed from the Fry Roofing Company job and pickets placed on the building." (R. 69)

* * * * *

"Q. And who was it again please who mentioned the threat of economic sanctions?

A. Mr. Manash.

Q. Mr. Manash. And what was his language?

A. His exact language I couldn't give you.

Q. Substantially.

A. Substantially that if the machinists were not removed from the job that the Building Trades Council would take strike action against Fry Roofing, withdraw the building, construction trades' workmen.

Q. Yes. You claim no contract with Volney or Fry in connection—

A. Pardon?

Q. You claim no contract on the part of Local 63 with Fry or Volney in this—

A. That is right.

Q. —work." (R. 73)

Further illustrative is the following excerpt from the testimony of V. J. Eggleston, manager for Respondent St. Johns:

"A. I can't tell you his exact words as to what he said, but the tenor of his conversation was the same at all times; that he wanted the contract with them, he intended it to be kept, and if it wasn't going to be kept he was going to do something about it, namely, pull those men off that job." (R. 83)

Such was the virulence of the strife at that time between these opposing union factions in the midst of

whose quarrel these Respondents were innocently and unwittingly thrown. We now submit that this record wholly fails to show bad intent or lack or complete good faith on the part of these Respondents, and that the issuance of a decree enforcing the Board's order would in no wise reasonably effectuate the policies of the Act.

2. The posting of notices is moot.

Again it must be borne in mind that we are here concerned with a construction project long since completed. None of Respondents Fry and Volney's Oregon employees other than manager Alexander were involved in the construction of the building or the installation of the machinery. This is a controversy between unions, none of whose members have been employed by Fry and Volney since the 28th day of January, 1948 (R. 103). The project was fully completed on said date without work stoppage or strike. We therefore submit that the posting of notices as demanded by Petitioner would not at this late date serve any useful purpose or effectuate the policies of the Act.

CONCLUSION

In summation of these Respondents' contentions, we respectfully submit that we have demonstrated that the Petitioner did not have jurisdiction over said Respondents for the reason that the activities in which they were engaged did not substantially affect commerce; that a valid closed shop contract existed between Fry and Volney and the Respondent unions, and further, that the acts complained of were excusable because of coercion and threats of economic sanctions and that the posting of notices as demanded by Petitioner at this late date is moot. The issuance of an enforcing decree herein accordingly should be denied.

Respectfully submitted,

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June, 1951.